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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/790,289	03/01/2004	Kati A. Chevaux	1010/0102US4	9500
32260	7590	09/16/2010		
NADA JAIN, P.C. 560 White Plains Road, Suite 460 Tarrytown, NY 10591			EXAMINER WINSTON, RANDALL O	
			ART UNIT	PAPER NUMBER
			1655	
			NOTIFICATION DATE	DELIVERY MODE
			09/16/2010	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary

Application No.

10/790,289

Applicant(s)

CHEVAUX ET AL.

Examiner

Randall Winston

Art Unit

1655

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 June 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 75-115 is/are pending in the application.
- 4a) Of the above claim(s) 75-78 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 79-115 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/22)
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date: _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____
- Paper No(s)/Mail Date: _____

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 06/14/2010 has been entered.

Claims 79-115 have been examined on the merits (Examiner acknowledges that claims 1-74 have been cancelled and claims 75-78 remains withdrawn from consideration.)

Applicants' arguments presented within the 14 June 2010 reply concerning the previous art rejection of record are deemed moot in view of the new grounds of rejection set forth below.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 79-115 are rejected under 35 US 103(a) as being unpatentable over Romanczyk, Jr (US 5,554,645) in view Faendriks (Derwent Acc No 1997-525196, see abstract)

A food product (i.e. non-chocolate) comprising (i) cocoa polyphenol (i.e. a polyphenol compound of formula An of claim 32) and (ii) L-arginine in various amounts is claimed.

Romanczyk teaches a food composition comprising a cocoa polyphenol (i.e. a polyphenol compound of formula An of claim 32 is within figure 3 of Romanczyk, named (-) epicatechin)) is used for anti-cancer purposes. (see, e.g. figure 3, column 7 lines 20-27 and entire patent) [please note that since Applicant's instant specification provides for very broad amount ranges of the instantly claimed ingredients therein - including from about 1 µg to about 10 g per unit dose of cocoa polyphenol and Romanczyk discloses high levels/percentages of cocoa polyphenol within such non-chocolate food compositions for inhibiting tumor growth for an anti-cancer purpose, Romanczyk claimed amounts/ranges would intrinsically provide the instantly claimed *in vivo* functional effect with respect to increasing nitric oxide, upon ingestion thereof]. Romanczyk, however, does not expressly teach that the active ingredient of L-arginine is contained within the claimed food composition nor does Romanczyk teach all the claimed forms of the food composition and all the claimed amounts/ranges used for an anti-cancer purpose.

Faendriks beneficially teaches that L-arginine can be used for anti-cancer purposes (see, e.g. abstract).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Romanczyk's food composition to include the active ingredient of L-arginine as taught by Faendriks within Romanczyk's food composition because the above combined teachings as a whole would create the composition comprising the combination of cocoa polyphenol and L-arginine having anti-cancer activity. Moreover, as discussed in MPEP Section 2114.06, "it is prima facie obvious to combine two or more compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to used for the same purpose". Furthermore, the adjustment of other conventional working conditions (e.g. the substitution of the claimed forms of the food composition such as non-chocolate pet food and determining suitable amount/ranges of each active ingredient within the claimed composition), is deemed merely a matter of judicious selection and routine optimization which is well within the purview of the skilled artisan.

Accordingly, the claimed invention was prima facie obvious to one of ordinary skill in the art at the time the invention was made, especially in the absence of evidence to the contrary.

Please note, the intended use of the above claimed composition (i.e. to induce a physiological increase in nitric oxide in human or veterinary animals) does not patentably distinguish the composition, per se, since such undisclosed use is inherent in the reference composition. In order to be limiting, the intended use must create a structural difference between the claimed composition and the prior art composition. In

the instant case, the intended use does not create a structural difference, thus the intended use is not limiting (see, e.g., MPEP 2112).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Randall Winston whose telephone number is 571-272-0972. The examiner can normally be reached on 8AM-5PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on 571-272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

RW

/Christopher R. Tate/
Primary Examiner, Art Unit 1655